IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1102 OF 2003

Smt.Sushilabai Tukaram Jadhav ...Appellant
Vs.
Smt. Bhamabai Vasudeo Supate
Since deceased through her L.Rs.
1A. Rajendra Vasudeo Supate & Ors. ...Respondents

Mr.A.A.Kumbhakoni for Appellant
Mr. Sachin U. Dhakephalkar for Respondents

CORAM: H.L.GOKHALE &
SMT.R.S.DALVI,JJ.
DATED: 19TH AUGUST, 2005

P.C.

1. Heard Mr. Kumbhakoni for the Appellant. Mr. Dhakephalkar appears for Respondents 2 to 5. Other Respondents are served. Notice was given to the Respondents on 15th March 2004 for final hearing. All the Respondents are served and there has been an interim order in terms of prayer clause (b) on the Civil Application whereby the execution of the impugned judgment and decree has been stayed.

2. The Appellant herein is the Defendant NO.1 in the Special Civil Suit No.54 of 1996 which the Plaintiffs have filed against her for partition and separate possession. One Shankar Sadashiv Jadhav who owns the suit properties had three wives. The Plaintiffs and the Defendants are heirs of these three wives claiming appropriate portion in the property

left behind by this Shankar Jadhav after his demise. In the suit filed against the Appellant she filed a written statement. She pointed out in other application Exhibit-62 that three suits were pending concerning the very property amongst the parties concerned. Through that application she pointed to the trial Court that she had applied to the Sessions Court for consolidating in one Court and the matter be adjourned. The application made to the trial Court was allowed on 19th November 2002. Mr.Kumbhakoni learned Counsel appearing for the Appellant points out that in view of the order the Appellant expected keeping the suit pending and not to proceed with the same till the consolidation order was passed by the District Judge. It however, appears that the learned Judge proceeded to record the evidence on 18th December, 2002 when the Appellant was not present and has thereafter passed the impugned decree which is the preliminary decree for partition of property on 18th January 2003. Mr.Kumbhakoni submits that although it can be said to be an error on the part of the Appellant of not remaining present after application Exhibit-62 was granted, the Appellant has an explainable reason as to why either her or her Advocate were not present. Mr. Dhakephalkar learned Counsel appearing for Respondents on the other hand submits that it was the responsibility of the Appellant to remain present in the Court and pointed out that the order of consolidation has been passed

subsequently by the District Court.

3. We have noted the submissions of both the parties. The rights of all concerned have got to be determined after a proper participation of all concerned in the proceeding. Technically the learned Judge can be said to be right, since the Appellant did not care to remain present. At the same time the Judge ought to have noted that he himself had passed an order granting an adjournment on the ground that an order of consolidation was expected from the District Court. In that view of the matter it would have been desirable for him to have adjourned the proceeding until further information was received from the District Court and not to have proceeded.

4. In the circumstances for the aforesaid reason we allow this Appeal. The impugned judgment and decree will stand set aside.

5. The suit will stand restored to the file of trial Court. That will however be on the payment of costs of Rs.5000/- by the Appellant to Respondents 2 to 5 who are represented by Mr.Dhakephalkar.

6. The Appellant had filed Civil Application bearing No.3060 of 2003 in this Appeal for stay. Ad-interim order had been passed by Division Bench of this Court on 15th March, 2004 whereby the execution

has been stayed. In as much as the suit is now restored obviously the execution will not proceed any more. Appeal is allowed accordingly. Civil Application also stands disposed of. Mr. Kumbhakoni and Mr. Dhakephalkar state that the parties will appear before the trial Court on a date which may be specified. Parties will appear before the trial Court on 19th September 2005 when the matter will be shown for directions. The Court will issue notice to parties remaining absent and will endeavour to decide the suits early. The Record and Proceedings be sent down.

. Appeal allowed without any order as to costs.

(H.L.GOKHALE,J.)

(SMT.R.S.DALVI,J.)